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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARD ANDREW RUSSELL,

Defendant and Appellant.

B208139

(Los Angeles County
Super. Ct. No. NA075834)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Judge. Affirmed as modified.

Lawrence R. Young & Associates and Lawrence R. Young for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Paul M. Roadarmel, Jr. and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Leonard Andrew Russell, appeals from his conviction of three counts of assault with a semiautomatic firearm in violation of Penal Code section 245, subdivision (b).¹ (All further statutory references are to the Penal Code except where otherwise noted.) The victims were three brothers, Albert Hernandez, Robert Ramos, and Christopher Ramos.² The trial court found defendant had twice been convicted of violent or serious felonies and served two prison terms. (§§ 667, subd. (b)-(i), 667.5, subd. (b), 1170.12.) The trial court imposed 3 concurrent 25 years to life sentences, enhanced by 5 years under section 667, subdivision (a). The section 667.5, subdivision (b) prior prison term enhancements were stricken. Defendant was ordered to pay: a \$200 restitution fine (§ 1202.4, subd. (b)); a \$200 parole revocation restitution fine (§ 1202.45); and a \$20 court security fee. (§ 1465.8, subd. (a)(1).) Defendant received credit for 243 days in presentence custody plus 36 days of conduct credit for a total presentence custody credit of 279 days.

II. BACKGROUND

Defendant's conviction arose out of a fight at a Pizza Hut restaurant and a subsequent confrontation in the victims' apartment. On the night of September 15, 2007, Sia Xiong was working as the shift manager at a Pizza Hut restaurant in Long Beach. Defendant, who is African-American, came in with a pregnant woman. Ms. Xiong took their pizza order and walked into the back. Suddenly, all her drivers rushed outside. There was a commotion, a fight. Defendant was involved in the fight. Defendant was on

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Unless otherwise noted, all future statutory references are to the Penal Code.

²

For purposes of clarity, Robert and Christopher Ramos will be referred to by their first names.

the ground and there were four people on top of him; he was being kicked. The pregnant woman was trying to stop defendant's assailants. She was pushed into the street; into a moving car. Ms. Xiong called the paramedics. Defendant was also on the telephone and he was walking back and forth. Ms. Xiong thought defendant was frustrated. She heard him say something about bringing a pistol. Ms. Xiong gave a statement to police officers that night. She told the officers she had heard defendant say, "I know it is my problem. Just bring the pistol." At trial, Ms. Xiong identified defendant.

At around 10 p.m. that night, Donald Rivers was visiting a friend, Elton Spinelli, at his apartment. Mr. Rivers heard a commotion in the hallway. Mr. Rivers looked out and saw the next door neighbor in the hallway with two males and a woman. Defendant was one of the men. Defendant and the other man went towards Robert. The other man had a weapon—a black semiautomatic gun with a laser light on it. There were words, but Mr. Rivers was not sure what was being said. Mr. Rivers heard "something about killing" or words to that effect. Someone said, "I will kill you." Then Mr. Rivers heard the door bang and defendant and the other man went inside the neighbor's apartment. Mr. Rivers heard gunshots. He called the emergency operator. Mr. Rivers did not see defendant with a gun.

Elton Spinelli was in the hallway taking to his neighbor, Michelle Abellana, before the shooting occurred. He returned to his apartment. Two minutes later, Mr. Spinelli heard a commotion—people arguing back and forth—and then gunfire. It was coming from the apartment next door. Mr. Spinelli's door was open when the commotion started. Mr. Spinelli looked out into the hallway and saw defendant and another man. They were arguing with Mr. Spinelli's neighbors, the Ramos family. Mr. Spinelli closed his door and looked out through the peephole to see what was occurring. Mr. Spinelli saw the argument. Then Mr. Spinelli saw a man pull out a gun. Mr. Spinelli backed away from the door and heard four gunshots. Mr. Spinelli waited a few minutes and then opened the door. He asked Ms. Abellana if anybody was hit or hurt. Ms. Abellana said yes, three people were hit. Defendant and the other man were gone. Mr. Spinelli did not see defendant with a gun. He could not hear what the argument was about.

Ms. Abellana testified she had just gotten home from work prior to the shooting. She heard her sons had been involved in a fight. She was about to go downstairs to the doughnut shop when she saw two men standing at the foot of her stairs—defendant and another man. Defendant asked her, “[W]here are the White boys at[?]” He kept asking, “[W]here are they at?” Ms. Abellana said: “[W]hat are you talking about. I don’t know. I just got off of work. . . . I don’t know what you are talking about.” She turned around and went back to her apartment. She told Mr. Spinelli, “I think those are the guys that were fighting with my sons.” Defendant and the other man ran up the stairs. The other man had his hand on his waistband. Ms. Abellana’s son, Robert, opened the door and she shoved him back in. Defendant said: ““There you go right there. There is that White boy right there.”” Ms. Abellana pushed Robert into the apartment and went in after him and closed the door. Then she heard the door kicked open. Robert and Mr. Hernandez, and their mother, Ms. Abellana, held the door shut. Defendant and the other man kicked the door open and grabbed Ms. Abellana’s youngest son. They pointed a gun to Ms. Abellana’s youngest son’s head and said, “[W]here is your other brother at.” Then they pointed the gun at Christopher’s head. Mr. Hernandez then tried to explain what had happened. But defendant was saying, ““No, shoot him, shoot him.”” Defendant said: ““No, there they go right there. Shoot them.”” Defendant said “Shoot them” three times. Ms. Abellana saw the laser on the gun. The man pointed the gun at Mr. Hernandez’s head. Then the gun was pointed at Mr. Hernandez’s chest. Ms. Abellana heard shots.

Mr. Hernandez, who was 26 years old, had been at home earlier that evening with his younger brothers. Robert went out to get a compact disc from Mr. Hernandez’s car, which was parked at a nearby Pizza Hut restaurant. Robert came back and said he had been harassed. Mr. Hernandez went downstairs to see what the problem was. Christopher, Robert, and their youngest brother followed Mr. Hernandez. Defendant was at the door to the Pizza Hut restaurant. Defendant came out yelling: ““Let’s go. It is on. Let’s go.”” Defendant was aggressive and loud. Mr. Hernandez said: ““No, no, I am not here to fight. I just want to ask you what’s going on here. Why are you harassing my little brother.”” Mr. Hernandez described defendant thusly: “And then he still just

going loud, trying to go crazy at us. And then he started yelling at my brother Robert. It looked like he was going to hit him.” Defendant said, ““I was just fucking around.”” Defendant started yelling at Robert. Mr. Hernandez thought defendant was going to assault Robert. Mr. Hernandez was holding Robert back. Mr. Hernandez said: “He is 16 years old. You shouldn’t be messing around with a kid like that.” Robert was yelling back at defendant. They got closer and closer to each other and then the fight started. All of the brothers were hitting defendant. They broke loose and started to walk away. Defendant still wanted to fight. Defendant was on his cell phone calling somebody. He repeatedly said: ““It is on. It is on. I am coming back. I am coming back on dubs.”” Defendant then threatened to return and referred to a gang.

Mr. Hernandez and his brothers returned to their apartment. Some 30 minutes later, their mother said there were two Black men downstairs inside the building. She pushed Robert inside and closed the door. That was when they kicked in the door. It sounded just like a loud bang. There were numerous kicks. It was loud. They tried to kick down an interior door, but Ms. Abellana, Mr. Hernandez and Robert held the door closed. Christopher and Ms. Abellana’s youngest son were in the hallway. Mr. Hernandez opened the front door and saw defendant and the other man. The other man had a .9 millimeter black gun with a red laser. The laser was pointed at Mr. Hernandez’s chest. Mr. Hernandez became frightened and said: ““What’s going on here. Why do you need a gun?”” Defendant repeatedly said: ““You killed my baby. You killed my baby.”” Mr. Hernandez did not know what defendant was referring to. Defendant told the other man: ““That’s him. Shoot that mother fucker. Shoot that mother fucker.”” The other man told Mr. Hernandez to come outside. The unidentified man aimed the gun at Mr. Hernandez’s thigh and told him again to come outside. Shots rang out. Mr. Hernandez heard three or four gunshots. Defendant and the other man ran off. Mr. Hernandez was shot in the left calf. His leg went numb. Mr. Hernandez could not feel his leg. Mr. Hernandez’s girlfriend was on the phone with the police. Mr. Hernandez suffered a “through and through” wound. He was treated at the hospital

and released. Mr. Hernandez still experienced numbness all the way down to the bottom of his leg.

Robert testified he walked by the Pizza Hut restaurant that night. Robert was walking to Mr. Hernandez's car. Defendant kept looking at Robert. Defendant was throwing his hands up and nodding his head up and down. Robert passed by on his way back home. Defendant did the same thing again. Defendant was doing it in an aggressive or angry manner. Robert described defendant's combative actions as follows, "I don't know, like, he wanted to fight or something." Robert went home and told Mr. Hernandez and Christopher about defendant's actions. Robert returned with his brothers. Defendant was shouting and Mr. Hernandez was trying to calm him down. Defendant was on his cell phone as he was walking towards them. He said, "I am calling my dubs" or something like that. The fight ensued. Defendant had Mr. Hernandez in a headlock. Mr. Hernandez's brothers were trying to free him. During the fight, defendant's girlfriend tried to pull him off. Defendant elbowed her and she fell.

After the brothers returned to their apartment, defendant came with a friend. Defendant saw Robert and said, "There goes that White boy right there." At some point, Christopher confronted defendant. Then defendant said, "You killed my baby, you killed my baby." Defendant's friend pulled out a gun. Defendant kept saying: "That's him right there. Shoot him" Robert heard four gunshots. Robert was hit in the left leg. His whole leg went numb. He hopped into the house and fell to the ground. When the gunshots started, defendant was still present. Robert did not see defendant with a gun.

Christopher testified defendant approached them outside the Pizza Hut. At that point, defendant was using his cell phone. Defendant said to them, "It is on" and he was calling a specific street gang. Defendant was making gestures in an angry and aggressive way. Mr. Hernandez was trying to talk to defendant in a calm tone. As defendant got closer to the brother, his girlfriend was trying to pull him back. The fight then started. Defendant swung at Robert. Mr. Hernandez pushed Robert back and tackled defendant. Mr. Hernandez's brothers then jumped into the fight. They tried to

pull defendant off Mr. Hernandez. Defendant accidentally pushed his girlfriend and she fell. Defendant threw his arm back and hit her and she tripped off the curb.

Christopher was not in the apartment when, later, defendant and the other man arrived. Christopher was down at the end of the hallway, out on a deck. Christopher heard two loud noises. Christopher then headed down the hallway toward his apartment. Christopher then saw defendant. Defendant said, “There goes one of them right there.” Defendant’s accomplice had a gun. Defendant said, “That’s him, blast his ass.” Defendant said it more than twice. Defendant was pointing at Christopher. The man pointed the gun at Christopher. At first, the gun was pointed at Christopher’s head. They were standing about four feet apart. Mr. Hernandez opened the door and the gunman aimed at his chest. Mr. Hernandez was telling the gunman to calm down. By contrast, the gunman was telling Mr. Hernandez to “come out” of the residence. Then the defendant’s accomplice put the gun to Mr. Hernandez’s head. Christopher went towards the gunman and pushed Ms. Abellana’s youngest son inside the apartment. The gunman threw Christopher off and said, “You touch me again, I am going to shoot you.” Christopher grabbed at the gun again and defendant’s accomplice just started shooting. A bullet grazed Christopher’s ankle. Christopher spoke to police that evening. Christopher quoted defendant as saying, “Get his ass, shoot him, shoot him.” Defendant made the statement just before the shots rang out. Defendant said, “Get his ass, shoot him, shoot him,” and the gunman started firing.

Mr. Hernandez saw defendant using a cell phone as they converged on the Pizza Hut restaurant. Defendant said he was “calling [a street gang] on you” and “you guys are dead.” Defendant seemed angry and started the fight. Defendant knocked his girlfriend down. He pushed her so that she fell. The man with the gun pointed it at Mr. Hernandez’s chest. When Christopher walked up, defendant said: “There goes one right there. Shoot him.”

Mr. Hernandez’s girlfriend, Michelle Gillet, arrived home from work before defendant and the gunman showed up. When the two men were trying to force their way into the apartment, Ms. Gillet called the emergency operator. She heard one of the men

say: ““You killed my baby. You killed my baby.”” The man also said: ““That’s him. Shoot him right there, blast his fucking ass.”” Then the shooting started.

Lilia Flores, who was eight months pregnant, accompanied defendant on the night of the shooting. They were living together. They went to the Pizza Hut restaurant near their apartment around 9:30 p.m. About five minutes later, they saw “a group of guys” walking towards the Pizza Hut restaurant. Robert was with them. They had what Ms. Flores described as “mean faces” on. Ms. Flores was “sort of” alarmed. Ms. Flores told them, “[J]ust leave us alone.” Mr. Hernandez verbally challenged defendant and a fight ensued. Ms. Flores started screaming for help, but nobody did anything. She tried to pull Robert off defendant. Robert turned around and pushed her away. She fell backward into a car.

Defendant testified in his own defense. He had just turned 22. He was at the Pizza Hut restaurant with his girlfriend on September 15, 2007. He was unarmed. He was not upset at anybody and he did not want to shoot anybody that day. He did not want to get into a fight. He just wanted to purchase a pizza. He had not been drinking nor using drugs. A young man walked by. Defendant testified he was “just goofing around,” making faces. Defendant had seen the young man before in the neighborhood. Defendant described the young man’s response: “And he was right there in the parking lot raising his hands up at me ‘mean mugging.’ And I just made a little smile like, you know, he is taking it the wrong way.” Defendant smiled, but the young man took it the wrong way. The young man left.

The next thing defendant knew there were four or five other men out in the parking lot. They were pointing at defendant and his girlfriend. Defendant went outside and approached the older brother. Mr. Hernandez asked, “[D]o you have a problem with my brother[?]” Defendant said no. Robert began swearing at defendant and they exchanged words. The next thing defendant knew he got hit from the side and kicked in the groin. They jumped on him and punched, kicked, and bit him.

Defendant telephoned a friend, a gang member. Defendant did not want to “get jumped” again. But he wanted to make sure there were no hard feelings; defendant and

his girlfriend frequented commercial establishments in the area and he did not want things to escalate. Defendant denied seeing a gun but he did hear shots. When he heard the shots, he was outside of the apartment building. He was not yelling at the person who had the gun to shoot or kill any of the brothers. He saw his pregnant girlfriend get hurt. He did not accidentally knock her down. She was pushed into a car. Paramedics were summoned as defendant thought she was badly hurt.

On cross-examination, defendant admitted he had been convicted of two attempted robbery charges in 2005. He was very upset and very frustrated when he saw his girlfriend pushed. She was seven months pregnant and fragile. Defendant claimed the police were called but they never arrived. Defendant did not call one of his “homies” from a street gang. He testified, “I don’t gang bang.” Defendant told Detective Pirooz he wanted to “squash it,” meaning, “[I]f you want to have a head up fight, you know, just one on one.”

When questioned by the police, defendant admitted telephoning a gang member. Defendant made the telephone call because he wanted “back up” when he went to the victims’ apartment building. Defendant explained the decision to telephone a gang member in order to secure “back up”: “Because he watched me grow up. He said if I ever needed any help to back me, he would be there.” On redirect examination, defendant admitted the gang member, known only by a moniker, kicked in the door to the victims’ apartment. Defendant saw the gang member pull out the gun. Because he was afraid, defendant ran downstairs. Then defendant heard the shots.

III. DISCUSSION

A. Cruel And Unusual Punishment

Defendant contends his 30 years to life sentence was cruel and unusual in violation of the state and federal Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) He argues he did not fire the shots and there was no evidence he knew a

semiautomatic weapon was used. This objection was not raised in the trial court. Defendant therefore forfeited the issue. (*In re Seaton* (2004) 34 Cal.4th 193, 197-198; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

Even if this issue had been preserved, the trial court could properly impose the 30-years-to-life sentence in compliance with state law. Defendant was sentenced in accordance with sections 667, subdivision (e)(2)(A)(ii) and 1170.12, subdivision (e)(2)(A)(ii). As a result, defendant was subject to a 25-years to life term. In addition, the trial court found defendant was previously convicted of two serious felonies pursuant to section 667, subdivision (a)(1) both of which were sustained in the same case. A five-year enhancement was added to defendant's sentence. Given defendant's prior history and the facts related both to him and his offenses, no constitutional violation has occurred by reason of his 30-years-to-life sentence. (*Rummel v. Estelle* (1980) 445 U.S. 263, 268; *Spencer v. Texas* (1967) 385 U.S. 554, 560; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1517; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828.) There was evidence defendant asked a known gang member to bring the gun to the scene. Moreover, there is evidence defendant not just encouraged but demanded that the gunman shoot the victims.

B. Aider And Abettor Liability

Defendant argues he could not be found guilty as an aider and abettor when he did not know and could not have foreseen that the perpetrator had a semiautomatic weapon and would use it. Further, he argues there was no evidence he specifically intended to assault the victims with a semiautomatic firearm. We review the record for substantial evidence supporting an aiding and abetting theory of liability. (*In re Hardy* (2007) 41 Cal.4th 977, 1030; *People v. Em* (2009) 171 Cal.App.4th 964, 969-970.)

The trial court instructed the jury: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly

committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.” The trial court further instructed the jury: “To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] and [¶] 4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator’s unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of the crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.”

The California Supreme Court has discussed the mental state necessary for liability as an aider and abettor: “To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted ‘with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ [Citation.] When the offense charged is a specific intent crime, the accomplice must ‘share the specific intent of the perpetrator’; this occurs when the accomplice ‘knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.’ [Citation.] Thus, we held, an aider and abettor is a person who, ‘acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission

of the crime.’ [Citation.]” (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *People v. Leon* (2008) 161 Cal.App.4th 149, 157.)

Substantial evidence supports the verdict. Defendant knew the gunman had the weapon. Defendant called the gang member on the telephone. Defendant demanded the gang member bring the handgun. Defendant then, as testified to by multiple witnesses, repeatedly and emphatically instructed the gunman to shoot the victims. When Mr. Hernandez tried to talk to the gunman, defendant said, ““No, shoot him, shoot him,”” and ““Shoot that mother fucker.”” Defendant pointed to Christopher and told the gunman, ““[B]last his ass.”” Defendant also said: ““That’s him right there. Shoot him . . .”” The gunman complied with defendant’s order. Only after the shooting stopped did defendant flee.

C. Court Security Fee

Following our request for further briefing, the Attorney General contends the trial court should have *orally* imposed a \$20 court security fee pursuant to section 1465.8, subdivision (a)(1) as to each of the three counts for which defendant was convicted for a total of \$60. We agree. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court orally imposed only one section 1465.8, subdivision (a)(1) court security fee. Three section 1465.8, subdivision (a)(1) court security fees should have been orally imposed.

IV. DISPOSITION

Two additional section 1465.8, subdivision (a)(1) court security fees must be imposed for a total, as presently reflected in the abstract of judgment, of \$60. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.